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4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA

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7 ZANE FLOYD,

8 Petitioner,

9 v.

10 WILLIAM GITTERE, *et al.*,

11 Respondents.

Case No. 2:06-cv-00471-RFB-DJA

ORDER

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13 Before the Court are Petitioner's motion for relief from judgment under Rule 60(b)(6) of
14 the Federal Rules of Civil Procedure (ECF No. 183) and motion for leave to supplement petition
15 for writ of habeas corpus (ECF No. 185). With the former, Petitioner asks the Court to relieve him
16 from its previous judgment in this federal habeas case and allow him to litigate his claim that his
17 execution under Nevada's lethal injection protocol is unconstitutional. With the latter, he asks the
18 Court to supplement Claim Eleven of his second amended petition for writ of habeas corpus (ECF
19 No. 66). For reasons that follow, the motions are denied.

20 **I. BACKGROUND**

21 In September of 2000, Petitioner was convicted of four counts of first-degree murder (and
22 several related offenses) and sentenced to death. After failing to obtain relief on direct appeal,
23 Petitioner pursued post-conviction relief in the Nevada courts. Shortly after those proceedings
24 concluded in February 2006, Petitioner initiated habeas corpus proceedings in this Court.

25 With the assistance of appointed counsel, Petitioner filed a first amended habeas petition
26 in October 2006. When the Respondents moved to dismiss the petition due to Petitioner's failure
27 to exhaust state court remedies, this Court issued a stay under Rhines v. Weber, 544 U.S. 269
28 (2005), to allow Petitioner to pursue exhaustion in state court. In June 2007, Petitioner filed a

1 second state habeas petition in state district court, which was denied. The Nevada Supreme Court
2 affirmed that ruling in November 2010.

3 In March 2011, this Court granted Petitioner's motion to lift the stay and reopen federal
4 habeas proceedings. Petitioner then filed a second amended petition for writ of habeas corpus.
5 Claim Eleven of that petition challenged the constitutionality of execution by lethal injection,
6 alleging it constitutes cruel and unusual punishment in all cases and, more specifically, in the
7 manner Nevada intended to carry out the sentence under its then-current protocol. In ruling upon
8 Respondents' subsequent motion to dismiss, this Court dismissed Claim Eleven as procedurally
9 defaulted because the Nevada Supreme Court had dismissed the claim as untimely under Nevada
10 law.

11 In September 2014, this Court entered a final order denying the second amended petition
12 on the merits, then, in December 2014, entered an amended final order that expanded the initial
13 certificate of appealability. On appeal, the Ninth Circuit affirmed this Court's denial of habeas
14 relief. Floyd v. Filson, 949 F.3d 1128 (9th Cir.), cert. denied sub nom. Floyd v. Gittere, 141 S. Ct.
15 660 (2020). With respect to the portion of Claim Eleven that challenged Nevada's lethal injection
16 protocol, the court of appeals held that the claim was "not yet ripe" because Nevada had no current
17 protocol that it could apply to the Petitioner. Id. at 1152.

18 In late-March 2021, the State of Nevada notified the media that it would be seeking a
19 warrant of execution to carry out Petitioner's death sentence. On April 15, 2021, Petitioner filed
20 the two motions now before the Court for decision. The following day, Petitioner filed a complaint
21 pursuant to 42 U.S.C. § 1983 challenging the constitutionality of Nevada's then-current execution
22 protocol. See Case No. 3:21-cv-00176-RFB-CLB. He also filed in that case a motion for
23 preliminary injunction/temporary restraining order and a motion for disclosure of method of
24 execution. ECF Nos. 5-7. On April 21, 2021, Petitioner also filed a motion for stay of execution
25 in the § 1983 case.

26 On June 7, 2021, the state district court entered an order of execution for the week of July
27 26, 2021. Within the next few days, the State of Nevada finalized a new execution protocol
28 replacing the protocol in place when Petitioner filed his motions in this case and his § 1983

1 complaint. On July 6, 2021, this Court granted Petitioner’s motions for a preliminary injunction
 2 and a stay of execution in the § 1983 case and enjoined the State from implementing any execution
 3 warrant or order prior to October 25, 2021. The State of Nevada appealed that decision to the Ninth
 4 Circuit. That appeal was subsequently denied as moot.

5 6 **II. LEGAL STANDARD**

7 Federal Rule of Civil Procedure 60(b) entitles the moving party to relief from judgment on
 8 several grounds, including the catch-all category “any other reason justifying relief from the
 9 operation of the judgment.” Fed. R. Civ. P. 60(b)(6). A motion under subsections (b)(4-6) must be
 10 brought “within a reasonable time.” Fed. R. Civ. P. 60(c)(1). Relief under subsection (b)(6)
 11 requires a showing of “extraordinary circumstances.” Gonzalez v. Crosby, 545 U.S. 524, 535
 12 (2005). Rule 60(b) applies to habeas proceedings, but only in conformity with AEDPA,¹ including
 13 the limits on successive federal petitions set forth at 28 U.S.C. § 2244(b). Gonzalez, 545 U.S. at
 14 529.

15 16 **III. DISCUSSION**

17 As an initial matter, this Court concludes that Petitioner’s Rule 60(b) motion is neither
 18 raising an entirely “new claim” nor is it attacking “the federal court’s resolution of a claim on the
 19 merits.” See id. at 531-32. Instead, Petitioner is seeking to revive a claim that was dismissed for
 20 technical procedural reasons. Thus, it is comparable to cases in which the court concluded that
 21 such a dismissal should not prevent the petitioner from ever obtaining federal habeas review of his
 22 claim due to the bar on second or successive petitions. See Ybarra v. Filson, 869 F.3d 1016, 1022–
 23 23 (9th Cir. 2017) (discussing Stewart v. Martinez-Villareal, 523 U.S. 637 (1998)).

24 Accordingly, Petitioner’s Rule 60(b) motion is not a successive petition for the
 25 purposes of § 2244(b). And, because Petitioner promptly filed his Rule 60(b) motion when the

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27
28 ¹ The Antiterrorism and Effective Death Penalty Act.

1 State announced its intent to proceed with his execution, the motion was made “within a reasonable
2 time” for the purposes of Fed. R. Civ. P. 60(c)(1).

3 Petitioner argues that the possibility that he will face execution with no court ever
4 entertaining his habeas challenge to the constitutionality of the execution combined with the
5 substantive merit of his proposed claim amount to the type of extraordinary circumstances
6 warranting Rule 60(b) relief. However, this Court questions, as a threshold issue, whether his
7 proposed supplemental claim may be brought in habeas corpus given the nature of Petitioner’s
8 allegations and his pending § 1983 action. Simply put, this Court does not find that it would be
9 proper to reopen this case to consider Petitioner’s challenge to Nevada’s lethal injection protocol
10 if such proceedings would be futile. See Lopez v. Ryan, 678 F.3d 1131, 1137 (9th Cir. 2012) (“In
11 the final analysis, however,. . . Lopez's underlying claim does not present a compelling reason to
12 reopen the case, because that claim is not a substantial one.”).

13 In Nettles v. Grounds, 830 F.3d. 922 (9th Cir. 2016) (en banc), the Ninth Circuit held that
14 habeas corpus and § 1983 are mutually exclusive remedies. A § 1983 action is the “exclusive
15 vehicle for claims brought by state prisoners that are not within the core of habeas corpus,” and
16 “habeas is available only for state prisoner claims that lie at the core of habeas.” Id. at 927, 930.

17 Relying on Supreme Court and Ninth Circuit case law, Respondents argue that method-of-
18 execution challenges must be brought under § 1983 and are not cognizable in a habeas proceeding.
19 ECF No. 192 at 5-6 (citing Glossip v. Gross, 576 U.S. 863 (2015); Hill v. McDonough, 547 U.S.
20 573 (2006); Nelson v. Campbell, 541 U.S. 637 (2004); Beardslee v. Woodford, 395 F.3d 1064 (9th
21 Cir. 2005)). In both Nelson and Hill, the Supreme Court condoned a complaint under § 1983 as an
22 appropriate vehicle for a method-of-execution claim. The Court’s reasoning in both cases was that
23 plaintiff’s action, if successful, would not invalidate the plaintiff’s sentence because the State could
24 use an alternative constitutional method to implement the sentence. Hill, 547 U.S. at 579-80;
25 Nelson, 541 U.S. at 645-46. Later, in Glossip, the Supreme Court characterized its holding in Hill
26 as requiring a method-of-execution claim to “be brought under § 1983 because such a claim does
27 not attack the validity of the prisoner's conviction or death sentence.” Glossip, 576 U.S. at 879
28 (citing Hill, 547 U.S. at 579-80). In a more recent case, Bucklew v. Precythe, 139 S. Ct. 1112

1 (2019), the Court addressed the standards that apply to § 1983 claims challenging methods of
2 execution.

3 Petitioner counters that Respondents are oversimplifying the issue by failing to recognize
4 that his challenge necessarily implicates the validity of his sentence because Nevada law does not
5 provide any alternatives to lethal injection that protect him from cruel and unusual pain. He relies
6 on an Eleventh Circuit case, Nance v. Comm'r, Georgia Dep't of Corr., 981 F.3d 1201 (11th Cir.
7 2020), to argue that his method-of-execution claim is cognizable in habeas. Nance involved a §
8 1983 action against Georgia corrections officials seeking an injunction to bar plaintiff's execution
9 by lethal injection, the only manner of execution authorized under Georgia law. Nance, 981 F.3d
10 at 1203. The court held, after reviewing Nelson, Hill, and Bucklew, that Nance's method-of-
11 execution claim was cognizable only in habeas because "a judgment in Nance's favor would imply
12 the invalidity of his death sentence—not only as a practical matter, but as a matter of logical
13 necessity." Id. at 1210 (emphasis original).

14 Petitioner's Nance-based argument is flawed for at least two reasons, both of which cause
15 this Court to question its habeas jurisdiction in this matter. First, Nance alleged in his § 1983
16 complaint that, due to his "unique medical situation," "the Constitution bars Georgia from
17 executing him by any method of lethal injection, regardless of the protocol." Id. at 1203 (emphasis
18 original). Relying on that allegation, the court in Nance concluded that Nance's § 1983 complaint
19 was cognizable only as a habeas petition because, unlike in Hill and Nelson where an injunction
20 would not stop the state from carrying out the execution with a different injection protocol, the
21 injunction Nance sought would prevent his execution from being carried out at all, which perforce
22 invalidated his sentence. Id. at 1210.

23 While Nevada, like Georgia, requires the use of lethal injection to carry out its death
24 sentences, Petitioner does not allege that, due to his particular circumstances, any method of lethal
25 injection Nevada chose to use would run afoul of the Eighth Amendment. To the contrary,
26 Petitioner identifies, in his § 1983 complaint, a proposed alternative method of execution by lethal
27 injection— i.e., execution by a one-drug lethal injection procedure using a barbiturate. See 3:21-cv-
28 00176-RFB-CLB; ECF No. 120 at 49-52. The Court also notes that the current execution protocol

1 cannot currently be implemented as the drugs that make up the protocol have expired and the
 2 NDOC does not anticipate being able to replace them. Id. Thus, unlike in Nance, the relief
 3 Petitioner seeks in his § 1983 action would not prevent Nevada from carrying out his execution.
 4 See id. at 69.

5 Second, the Nance decision is premised on the mutual exclusivity between habeas and
 6 § 1983. See Nance, 981 F.3d at 1206, 1211 (citing McNabb v. Comm'r, Ala. Dep't of Corr., 727
 7 F.3d 1334, 1344 (11th Cir. 2013)). Recognizing that it was forced to choose one or the other, the
 8 court ultimately determined that “Nance's claim falls beyond the outer border of section 1983 and
 9 is cognizable only in habeas.” Id. at 1211.

10 Here, Petitioner is actively pursuing § 1983 relief in a separate case without any argument
 11 from the Defendants that his method-of-execution claim is not cognizable as a civil rights action.
 12 Indeed, the Petitioner in this case has secured injunctive relief in his Section 1983 case. The award
 13 of such relief only underscores the general principle that “[a section] 1983 action is a proper
 14 remedy for a state prisoner who is making a constitutional challenge to the conditions of his prison
 15 life, but not to the fact or length of his custody.” Preiser v. Rodriguez, 411 U.S. 475, 499 (1973).
 16 While the “conditions” label is not “particularly apt” for a method-of-execution challenge, the
 17 Supreme Court has recognized § 1983, rather than habeas, as the more appropriate vehicle for
 18 bringing such claims. See Nelson, 541 U.S. at 644. This Court can find no controlling or persuasive
 19 case law that allows a petitioner bringing a method-of-execution challenge, to assert, on the one
 20 hand, that his remedy lies in habeas because a successful challenge would invalidate his sentence,
 21 while, at the same time, claim he is entitled to (and receives) relief under § 1983. Clearly, Nance
 22 does not countenance such a position.

23 Petitioner also argues this Court should consider his supplemental habeas claim in case the
 24 Ninth Circuit or the Supreme Court rules his § 1983 challenge improper, which would foreclose
 25 his challenge to Nevada’s lethal injection protocol. He has not, however, demonstrated that such a
 26 ruling is likely. In fact, as noted, Petitioner had obtained injunctive relief in his § 1983 case. Also,
 27 this Court does not find that it can premise its habeas jurisdiction on Petitioner’s need for a fallback
 28 to his § 1983 case, especially given the holding in Nettles.

1 **IV. CONCLUSION**

2 In light of the foregoing, this Court finds based on the specific facts in the record before it
3 that Petitioner's exclusive remedy with respect to his lethal injection claim is his pending civil
4 rights action under § 1983.

5 **IT IS THEREFORE ORDERED** that Petitioner's motion for relief under Rule 60(b)
6 (ECF No. 183) and motion for leave to supplement petition for writ of habeas corpus (ECF No.
7 185) are DENIED. The Clerk of Court is directed to administratively close this case.

8 **IT IS FURTHER ORDRED** that a certificate of appealability is DENIED, as jurists of
9 reason would not find it debatable whether the Court's decision is correct.

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11 **DATE:** March 30, 2022

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14 **RICHARD F. BOULWARE, II**
15 **UNITED STATES DISTRICT JUDGE**
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